

# Client Alert

January 28, 2015

## SEC Suspends Review of Conflicting Shareholder Proposal No-Action Requests

By Scott Lesmes, David Lynn and Rose Zukin

On January 16, 2015, the Division of Corporation Finance of the U.S. Securities and Exchange Commission (the “Staff”) announced that the Staff will express no views on no-action requests, arguing that shareholder proposals may be excluded from companies’ proxy materials in reliance on Rule 14a-8(i)(9) under the Securities Exchange Act of 1934, as amended. The Staff’s announcement followed a statement issued by SEC Chair Mary Jo White on the same day, directing the Staff to review the Rule 14a-8(i)(9) basis for exclusion and report to the Commission on its review. Chair White’s announcement came after concerns arose with respect to the proper scope and application of Rule 14a-8(i)(9) in a number of no-action requests seeking to exclude “proxy access” shareholder proposals.

Rule 14a-8(i)(9) allows a company to exclude a shareholder proposal that “directly conflicts” with a management proposal. This provision has been subject to increased interest this proxy season, as a number of companies have sought to rely on Rule 14a-8(i)(9) to exclude shareholder proposals that seek an amendment of a company’s governing documents to allow “proxy access” for shareholders. “Proxy access” refers to measures that would require a company to include shareholder-nominated candidates for the board of directors on the company’s proxy card alongside the company’s own nominees, if certain procedural requirements (e.g., notice and share ownership) are met by the nominating shareholder(s). In seeking to exclude proxy access shareholder proposals under Rule 14a-8(i)(9), companies have argued in numerous no-action requests submitted this season that a proxy access shareholder proposal “directly conflicts” with management’s own proxy access proposal.

A shareholder proposal and a management proposal need not be identical in scope or focus for Rule 14a-8(i)(9) to be available. Rather, the Staff has interpreted the rule to permit the exclusion of any shareholder proposal if the inclusion of the management proposal and the shareholder proposal in the same proxy statement “would present alternative and conflicting decisions for the shareholders and would create the potential for inconsistent and ambiguous results.” For example, on December 1, 2014, Whole Foods Markets, Inc. received no-action relief from the Staff to exclude a shareholder proposal that requested proxy access for a group of shareholders owning 3 percent of the company’s shares for 3 years, on the basis that the shareholder proposal would conflict with the company’s proposal to allow proxy access for a single shareholder owning 9 percent of the company’s shares for 5 years. The Staff subsequently granted a request for reconsideration of the *Whole Foods* letter and noted that, in light of Chair White’s announcement, “the Division would not express any views under rule 14a-8(i)(9) for the current proxy season.”

Following Chair White’s statement and the Staff’s subsequent announcement, a representative of proxy advisory firm Glass Lewis & Co. told the *Wall Street Journal* that Glass Lewis will consider recommending that shareholders vote against a company’s slate of directors if the company seeks to block shareholder-submitted proposals on the grounds that they “conflict” with the companies’ own proposals pursuant to Rule 14a-8(i)(9). Glass Lewis said it may take such steps in situations where a company’s proposal “varies materially” from the

# Client Alert

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shareholder-backed measure and management fails to provide “sufficient rationale.” Proxy advisory firm Institutional Shareholder Services Inc. has not yet commented on this topic.

The Staff’s decision to express no view regarding Rule 14a-8(i)(9) affects not only proxy access shareholder proposals, but also the consideration of any other proposal topics that may conflict with a management proposal (e.g., shareholders’ ability to call a special meeting, shareholder action by written consent). During the Northwestern Law 42nd Annual Securities Regulation Institute held this past week, the Staff informally indicated that, although the Staff has no capacity to comment on — or grant no-action relief pursuant to — the rule this proxy season, the exclusion survives. Without having the ability to seek the Staff’s concurrence to exclude a proposal based on Rule 14a-8(i)(9), companies may pursue a number of alternative methods for addressing shareholder proposals that conflict with management proposals. Such alternative methods could: (1) include both the shareholder proposal and the management proposal in the proxy statement, with an explanation to shareholders regarding any differences in scope or applicability; (2) include the shareholder proposal with a recommendation that it not be approved by shareholders; (3) negotiate with the proponent to withdraw its proposal in light of the management proposal to be included in the proxy materials; (4) rely on existing Staff precedent to exclude the proposal under Rule 14a-8(i)(9) after submitting a notice of such intention to the Staff pursuant to Rule 14a-8(j) and including the management proposal in proxy materials, subject to the risk that a shareholder might seek to challenge such action in federal court; or (5) seek a declaratory judgment from a federal court that a shareholder proposal may be excluded under Rule 14a-8(i)(9).

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